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In the Supreme Court of the United States

UPPER ARLINGTON CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.
Petitioners,

v.

JOSEPH JAMES, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Petition Should Be Granted to Clarify That the IDEA Requires Parents of Children Attending Private, As Well As Public, Schools to Give Prior Notice of Intention to Seek Tuition Reimbursement. 5

II. The Sixth Circuit's Imposition of a Duty to Prepare an IEP For a Student Attending a Private School Is Inconsistent with the IDEA as Interpreted by the Agency Charged With Its Enforcement. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases

American Federation of Musicians v. Wittstein,
379 U.S. 171 (1964) 9

American Tobacco Co. v. Patterson,
456 U.S. 63 (1982) 8

C.I.R. v. Lincoln Savings & Loan Assn.,
403 U.S. 345 (1971) 11

Florence County School Dist. Four v. Carter,
510 U.S. 7 (1993) 4

Manual Enterprises, Inc. v. Day,
370 U.S. 478 (1962) 10

Morton v. Ruiz,
415 U.S. 199, 201-02 (1974) 10

School Comm. of Burlington v.
Department of Educ. of Mass.,
471 U.S. 359 (1985) 4

United States v. Article of Drug, Bacto-Unidisk,
394 U.S. 784 (1969) 11

United States v. Ruzicka, 329 U.S. 287, 288 (1946) . . . 9

Statutes

20 U.S.C.A. Section 1415(a)(10)(C) 5

Regulations

34 C.F.R. Part 300, App. C, question 6 . . . . . 4, 9

34 C.F.R. Section 300.403(c) 3, 5

34 C.F.R. Section 300.403(d) 3

34 C.F.R. Section 300.403(d)(1) 6, 8

34 C.F.R. Section 300.454(a)(1) 4, 8

34 C.F.R. Section 300.507(c) 8

Other Authorities

Letter to Graham,
22 IDELR 502 (OSEP Oct. 5, 1994) 4, 8

INTEREST OF *AMICI CURIAE* SCHOOL BOARDS ASSOCIATIONS

The Ohio School Boards Association (OSBA), as well as the National School Boards Association (NSBA) and the other state school boards associations within the Sixth Circuit - the Kentucky School Boards Association, the Michigan Association of School Boards, and the Tennessee School Boards Association - are actively involved in providing a wide array of support services to their member boards and in promoting the effective management of the public schools.[1] The services provided by OSBA and the other state school boards associations include training programs and workshops for school leaders, informational support through publications and person-to-person contact, management consulting, policy analysis, legal services, legislative advocacy, labor relations representation, and superintendent searches. NSBA maintains a special focus on national policy issues in education and has frequently appeared before this Court as *amicus curiae* in cases of great import to public education. All the *amici* are vitally interested in issues relating to special education and in the sensible resolution of the competing concerns of parents, educators, and taxpayers in this sometimes troubled arena.

The appearance of these *amici* today is prompted by the rather astonishing conclusion of the Sixth Circuit Court of

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[1] Counsel for the *amici* authored the brief in whole. No person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of the brief. This brief is filed with the consent of the parties. Letters of consent have been filed with the Clerk.

Appeals in this case, which has found, by a 2-1 majority, that liability for special education tuition reimbursement may be imposed upon a public school district merely as a consequence of a single, informal contact by parents with a public school official. Under this decision, liability for private school tuition may be imposed even though the child in question was not enrolled in the public school and even though it is not alleged that the public school district refused to enroll the child. The decision furthermore declares that a public school district has a duty to prepare an IEP (individualized education plan) for a disabled child *prior* to any decision by the parents to actually enroll the child in the district.

This holding clearly demonstrates the existence of a glaring "gap" in special education law - namely, the lack of a definable standard for imposing liability for tuition reimbursement when such claims are presented by students *not enrolled* in the public schools. If upheld, this decision would impose an unfair burden and significant new costs upon public school districts, and particularly upon those within the Sixth Circuit. Not only would these public schools be exposed to the direct cost of new claims for tuition reimbursement; they would also be required to divert precious educational resources to the development of IEPs for *non-enrolled students* who would be permitted to file a claim for reimbursement (plus attorney fees) under the holding of these case. In an environment where public schools are already struggling to fund the increasing share of their resources which must be devoted to special education, this is certainly an unwelcome, and ultimately counterproductive, result.

For the above reasons, these *amici curiae*, comprised of all the state school boards associations within the Sixth

Circuit, together with the *amicus* National School Boards Association, respectfully ask the Court to grant the Petition for Certiorari filed herein to answer an as yet unresolved question under the IDEA as it relates to liability for tuition reimbursement, and to provide guidance to public schools in all of the states as to their obligations with respect to non-enrolled students.

SUMMARY OF ARGUMENT

Under the current laws and regulations governing special education, a "gap" exists with respect to the question of when, and under what circumstances, parents are entitled to tuition reimbursement for a private school placement which they have chosen for their child. This gap arises out of a flawed assumption which permeates the current statutes and regulations; namely, that the fact pattern presented in a tuition reimbursement case always involves a student who is initially enrolled in a public school and subsequently withdrawn from the public program and enrolled in a private school. For example, the regulations provide that, in order to be eligible for tuition reimbursement, parents must notify the public school of their concerns and intent prior to date on which they "withdraw" their child from the public program. 34 C.F.R. Section 300.403(c),(d). The public school must then respond to these parental concerns prior to the date on which the student "enrolls" in the private school. Clearly, these regulations do not anticipate the very different fact pattern presented by students like Joseph James, *who, by their parents' choice, already are being educated in a private school*. In such cases, there is no public school "withdrawal" or private school "enrollment" to trigger the procedural rights and obligations described herein.

This Court's decisions in *School Comm. of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359 (1985) ("*Burlington*"), and *Florence County School Dist. Four v. Carter*, 510 U.S. 7 (1993) ("*Florence County*"), permitting in certain instances reimbursement by public schools of parents who bring due process requests under the IDEA *before* unilaterally placing their children in private schools, do not answer the questions in this case. In *Burlington* and *Florence County*, the public school districts were aware that the parents disagreed with the proposed public school placements when the parents resorted to the "self-help" remedy of private placement. By contrast, the parents in this case did *not* request due process or an IEP from the public school district before unilaterally placing their child in private school.

An additional problem with the Sixth Circuit's decision is its requirement that a school district prepare a "pre-enrollment" IEP for a child still attending private school. This requirement finds no support in the case law or in regulations under the IDEA. *See Letter to Graham*, 22 IDELR 502 (OSEP Oct. 5, 1994), (see Petition at 18) (United States Department of Education advised that under the IDEA, school districts are not required to provide services, including an IEP, for a child who is privately placed by his parents); *see also* 34 C.F.R. Section 300.454(a)(1) (1999) (private school children do not have the right to receive some or all of the special education and related services that the child would receive if enrolled in a public school); *cf.* 34 C.F.R. Part 300, App. C, question 6 (1993).

The Sixth Circuit decision in this case upsets the IDEA's balance of interests between parents and public school

districts, conflicts with decisions from other federal circuits[2] and runs contrary to the premise underlying this Court's decisions authorizing private school tuition reimbursement. For all of these reasons, this Court should grant the Petition and reverse the court of appeals' judgment in accordance with Petitioners' request.

ARGUMENT

I. The Petition Should Be Granted to Clarify That the IDEA Requires Parents of Children Attending Private, As Well As Public, Schools to Give Prior Notice of Intention to Seek Tuition Reimbursement.

Under the IDEA, when parents withdraw a disabled student from public school and seek to require the public school to pay the student's private school tuition, the parents must establish that they acted reasonably, made their child available for an evaluation upon request, and, most importantly, provided adequate and timely notice to the public school of their rejection of the public school's proposed placement and their intention to enroll the child in a private school at public expense. *See, e.g.*, 20 U.S.C.A. Section 1415(a)(10)(C), 34 C.F.R. Section 300.403(c).[3] Such notice

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[2] The split in the federal circuits was addressed in the Petition for Certiorari submitted by Upper Arlington City School District. Petition at 6-12. The *amici* adopt Petitioners' circuit conflict argument.

[3] Although this case was decided under the federal law that was in effect prior to the reauthorization of the IDEA in 1997 ("IDEA 1997"), IDEA 1997 and the corresponding federal regulations do not resolve the issues raised by this case.

must be provided to the IEP team during the most recent IEP meeting before the student's withdrawal or in writing at least *ten business days before the withdrawal.* 34 C.F.R. Section 300.403(d)(1). This requirement affords the public school district with notice of the parents' specific concerns and an opportunity respond to those concerns before the student is withdrawn and enrolled in the private school.

In the present case, however, the Sixth Circuit has created a standard under which a public school district can be held accountable for private school tuition costs based upon an *unarticulated, indirect* notice to a public school district. There is nothing in the record to suggest that the Jameses formally requested an IEP, provided the district with information regarding Joseph's present levels of performance, described their concerns, or stated their intent to seek tuition reimbursement from the public school district. Rather, the Jameses merely allege that they had a conversation with the special education director and discussed their son's "possible return" to the school district. See Petition at 4.

The Jameses own actions demonstrate that this informal conversation in 1994 was not sufficient under the IDEA to place the district on notice that they were seeking to either reenroll Joseph in the public school or obtain reimbursement for his private school tuition costs. The record reflects that in 1990, the Jameses specifically requested a new IEP for their son.[4] Although Joseph no longer attended public school, the district proceeded with the evaluation and coordinated its reevaluation efforts with his private school. Given this history, it was reasonable for the district to have

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[4] See Court of Appeals Opinion, App. to Petition at 2a.

assumed that if the Jameses intended to re-enroll their son in 1994 or to seek reimbursement for their private school tuition costs, they would have (a) submitted a request for an evaluation and/or IEP, as they did in 1990, or (b) notified the district of their intent to seek reimbursement for Joseph's private school tuition costs. These actions would have afforded the district with notice and an opportunity to make an appropriate public education available to their son. Since the Jameses did not take either of these actions in 1994, the Court of Appeals' decision that the school district was obligated to propose an educational program is obviously contrary to existing IDEA requirements for school district notification. This discrepancy between the duty of notification imposed on the parents of public schools students and the parents of private school students has no basis in current law, and clearly upsets the delicate balance between parental obligations and school district obligations which Congress has created under the IDEA.

The Sixth Circuit's decision in this case effectively creates a lopsided system requiring prior notice of intent to seek tuition reimbursement from parents of children attending public schools, but practically nonexistent notice from parents of children attending private schools. Under the IDEA, the parents of disabled students who have dutifully enrolled their children in the public schools and attempted to obtain an appropriate educational program there, and whose circumstances are well known to the public school, are required to adhere to a formal notification procedure before seeking tuition reimbursement for a private placement. Under the Sixth Circuit's ruling, however, the parents of students attending private schools, whose circumstances may be totally unfamiliar to the public school, and who should if anything adhere to a higher standard of notice, are able to access public

funds based upon an almost casual verbal interaction with a public school official. This result is contrary to basic precepts of exhaustion of administrative remedies and incompatible with the standard of parental responsibility existing elsewhere in the IDEA. *Cf.* 34 C.F.R. Section 300.403(d)(1) (parent notice before removing child from public school), 34 C.F.R. Section 300.507(c) (parent notice regarding due process hearing request). Because the Sixth Circuit's application of the IDEA in this case creates an unreasonable result which ought to be avoided, *cf.*, *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982), the *amici* urge this Court to grant the Petition to rectify this glaring incongruity.

II. The Sixth Circuit's Imposition of a Duty to Prepare an IEP For a Student Attending a Private School Is Inconsistent with the IDEA as Interpreted by the Agency Charged With Its Enforcement.

The United States Department of Education has advised that under the IDEA, school districts are *not* required to provide services, including developing an IEP, for a child who is privately placed by his parents. *Letter to Graham*, 22 IDELR 502 (OSEP Oct. 5, 1994)("Under Part B, parentally-placed children with disabilities do not have an individual entitlement to services. Therefore, school districts are not required to provide those children with all of the services under Part B to which they would be entitled if served in a public placement, nor are school districts required to serve each and every parentally-placed child with a disability")(see Petition at 18). Additionally, regulations under the IDEA provide that "[n]o private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. Section 300.454(a)(1) (1999);

cf. 34 C.F.R. Part 300, App. C, question 6 (1993) (if a child with a disability who has been receiving special education in one district moves to another district, the new district should hold an IEP meeting "within a short time after the child enrolls" and before placement in a special education program in the new district).

In this case, however, the Sixth Circuit, reasoning that "[t]he obligation to deal with a child in need of services, and to prepare an IEP, derives from residence in the district," Op. at 6 (App. to Petition at 6a), has held that when the parents of a private school student "approached the school district" about re-enrollment but did not request a due process hearing, the school district's "refusal to do an IEP pre-enrollment constitutes ...a violation [of the IDEA]." Op. at 6 (App. to Petition at 6a). This is, quite simply, an unsupportable conclusion based upon existing precedents. As noted in the dissent, there is no case law establishing a requirement for a school district to prepare an IEP *pre*-enrollment, and indeed, the case cited for that proposition by the court of appeals did not involve that issue. *See* dissenting opinion of Judge Ryan, Op. at 12, n.3 (App. to Petition at 13a).

All of the foregoing points to the need for review by this Court. Not only does the Petition present an important issue concerning the administration of the IDEA, *cf., United States v. Ruzicka*, 329 U.S. 287, 288 (1946) (granting certiorari to resolve significant statutory application issue); *American Federation of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964) (important issue of first impression under LMRDA), the Sixth Circuit's decision is at odds with the established policy of the United States Department of Education not to require school districts to provide services, including development of an IEP, for children who are

privately placed by their parents. *Cf. Morton v. Ruiz*, 415 U.S. 199, 201-02 (1974) (granting certiorari when decision below alleged to be "inconsistent with long-established policy of the Secretary [of the Interior] and of the Bureau [of Indian Affairs]"). The Sixth Circuit's decision in this case overturns this settled administrative interpretation, creating confusion among school districts regarding the circumstances under which they are charged with providing special education services to students not enrolled in their schools.

Finally, it should also be noted that the Sixth Circuit's decision undermines fundamental notions of fair play which are implicit in the IDEA's extensive system of procedural safeguards. Without timely, adequate notice from parents, school districts are left to guess whether a parent of a student who has been attending private school for years wishes to pursue either a return to the public school or a private school placement at taxpayer expense. The logistical nightmare of attempting to determine parents' unspecified intentions, together with the attendant financial uncertainty regarding tuition reimbursement obligations, add up to an untenable position for public school districts attempting to plan their programs and their budgets.

CONCLUSION

Because the Court of Appeals' decision in this case is inconsistent with the proper interpretation of the IDEA, and has significant implications for the public schools across the nation and for the administration of this important federal statute, *cf. Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 479-80 (1962) (granting certiorari to consider the claim that the ruling below was inconsistent with the proper interpretation and application of a federal statute and with

principles established in two of the Court's prior decisions); *see also C.I.R. v. Lincoln Savings & Loan Assn.*, 403 U.S. 345, 346-47 (1971), *United States v. Article of Drug, Bacto-Unidisk*, 394 U.S. 784, 791 (1969), it is clear that the present case is a compelling one for Supreme Court review.

It is accordingly urged most strongly upon this Court by the *amici curiae* Ohio School Boards Association, National School Boards Association, Kentucky School Boards Association, Michigan Association of School Boards, and Tennessee School Boards Association that it grant the Petition herein, overturn the Sixth Circuit's decision, and create a uniform standard that assures that public school districts will have sufficient notice and an opportunity to respond to parental concerns before the public schools will be held liable for the cost of private school tuition.

Respectfully submitted,

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